No. 93-772

In the

Supreme Court of the United States

October Term, 1993

PETE WILSON, Governor of the State of California;
JAMES W. VAN LOBEN SELS, Director of the
California Department of Transportation,
Petitioners,

v.

WILLIAM BIGGS, et al,
Respondents.

Petition for Writ of Certiorari to the
Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully moves this Court for leave to file the attached amicus curiae brief in support of the petition for writ of certiorari. Written consent to the filing of this brief has been granted by counsel for petitioner and has been lodged with the Clerk of this Court. Counsel for respondent Biggs has withheld consent, necessitating the file of this motion.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has over 20,000 contributors and supporters located throughout the country and maintains its principal office in Sacramento, California. The Foundation's policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community.

Amicus seeks here to augment the argument in the petition for writ of certiorari. It is believed that PLF's public policy perspective and litigation experience in support of individual rights and government accountability will provide an additional viewpoint with respect to the constitutional issues presented. PLF has participated in numerous cases involving issues arising under the Tenth Amendment and the Commerce Clause of the United States Constitution, as well as various cases involving government accountability (*e.g.* state tax reform issues, Cal. Const. Art. XIIIA ("Proposition 13" property tax rollback); state term limit litigation, *see* Cal. Const. Art. IV, § 1.5, *et seq.* (Proposition 140)); giving PLF extensive knowledge of the constitutional issues presented. *See, e.g., Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, Inc., 467 U.S. 837 (1984), *Nordlinger v. Hahn*, 120 L. Ed. 2d 1 (1992); *Environmental Protection Agency v. Brown*, 431 U.S. 99 (1977); *Hoffman Homes, Inc. v. Environmental Protection Agency*, 999 F.2d 256 (7th Cir. 1993); *Legislature v. Eu*, 54 Cal. 3d 492 (1991), *cert. denied*, 503 U.S. ___, 117 L. Ed. 2d 516 (1992). Thus, Pacific Legal Foundation's

concern is not for the State of California as a political entity, but for the accountability of that entity to its citizens.

In 1787, the individual States of this country delegated certain enumerated powers to the National government. A necessary (and often ignored) precursor to this delegation was the authorization by the citizens of these respective States, which allowed the States to make such a delegation. This "agency" provided the foundation and rationale of our federal system, with the States, as separate and indestructible entities, operating as a bulwark against the threat of an over-centralized, unresponsive and unrepublican National government.

Shortly after this delegation was made, its limited nature was emphasized in the Tenth Amendment:

> *The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.*

U.S. Const. Amend. X (emphasis added). This amendment (and it should be stressed that it *amended* the Constitution) not only highlights the sanctity of the sovereignty of the individual States, but premises that sanctity on the reservation of power to the people.

The Ninth Circuit ignored both the limited delegation of power to Congress embodied in the *interstate* Commerce Clause and the reservation of power to the States and the people. Amicus believes that the opinion below improperly construed the Fair Labor Standards Act (FLSA), improperly interfered with the sovereign functions of a state that go to the heart of representative government, ignored the limits the Tenth Amendment imposes on the congressional commerce power, improperly applied the "plain statement" rule, and improperly applied the principles enunciated by this Court in

Gregory v. Ashcroft, 501 U.S. ___, 115 L. Ed. 2d 410 (1991), and *New York v. United States*, 505 U.S. ___, 120 L. Ed. 2d 120 (1992). In short, the court below unnecessarily rendered the government unaccountable to its constituents.

For the foregoing reasons, Pacific Legal Foundation requests that its motion to file the amicus curiae brief which follows be granted.

DATED: December, 1993.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The interest of amicus curiae is set forth in the preceding motion and is adopted herein.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at *Biggs v. Wilson*, 1 F.3d 1537 (9th Cir. 1993). The court below, in affirming a lower court decision, 828 F. Supp. 774 (E.D. Cal. 1991), held that the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* (FLSA), contained an *implied* "prompt payment" requirement that required the State of California to pay its employees "promptly," in derogation of the California constitutional and statutory provisions governing the State's budget process. 1 F.3d at 1539-44. Through these state constitutional and statutory provisions, the California voters have prohibited the expenditure of their taxes for any purpose until the Legislature has enacted, and the Governor has signed, a budget for that fiscal year. These provisions have been in place as far back as 1922.

The Ninth Circuit further held that adherence to its implied "prompt payment" requirement did not violate the State of California's sovereignty under the Tenth Amendment. *Id.* at 1543-44. In the court's eyes, the FLSA was "to be liberally construed to apply to the furthest reaches consistent with Congressional direction." *Id.* "To the extent compliance with the FLSA interferes with the state budgetary process, that interference is caused by state law, not federal law. The FLSA does not require California to pass a budget on time; it only requires California to do what all employers must do--pay its employees the minimum wage on payday." *Id.* at 1543. The court seemed to say that the State's remedy lies in ignoring its constitution and the will of the California electorate or, in the alternative, hastily enact a potentially wasteful or incomplete state budget solely for the purpose of complying with the Ninth Circuit's "prompt payment" requirement.

The Ninth Circuit also distinguished this Court's opinion in *Gregory v. Ashcroft*, 501 U.S. ___, 115 L. Ed. 2d

410 (1991), stating that the "plain statement" rule was inapplicable to the present case because "the FLSA clearly applies to state employees such as Biggs." 1 F.3d at 1544. The Ninth Circuit did not address the issue of whether a State's constitutionally mandated budget process was worthy of heightened scrutiny as a matter that went to the heart of representative government. *See Ashcroft,* 115 L. Ed. 2d at 421-28. This Court's opinion in *New York v. United States* was also found to be inapplicable because the Ninth Circuit read that case as dealing solely with the scope of Congress' Commerce Clause powers, not the Tenth Amendment protection of a State's existence as a separate and viable political entity. 1 F.3d at 1544.

STATEMENT OF THE CASE

Pacific Legal Foundation adopts Governor Wilson's Statement of the Case and incorporates that portion of the Governor's Petition for Certiorari herein with the following amplification: The People of California have exercised their prerogative in requiring that a state budget be enacted by the Legislature and signed by the governor before the government may spend one dollar of the taxpayers' money. *See* Cal. Const. Art. IV, § 12, *et seq.*, Cal. Govt. Code § 13340. For the time period in question, the State of California had no authority to issue pay "warrants" in lieu of paychecks. *See id.* Further, another recent federal court case found that such pay warrants, issued in subsequent years, were also in violation of the FLSA. *Parr v. State of California*, 811 F. Supp. 507 (E.D. Cal. 1992). Thus, the impact of the Ninth Circuit's decision on California's sovereignty, and its citizens' ability to maintain control over their government, will be extreme. The impact on state employees (not to mention interstate commerce) was minimal, because the state employees, along with the myriad benefits peculiar to state employment, were guaranteed their salaries as soon as a budget was enacted. Further, state employees have different contractual expectations than

private sector employees. State workers take their jobs with the knowledge that they are public servants, that their paychecks are paid with tax dollars, and are subject to the above-mentioned state constitutional and statutory provisions.

SUMMARY OF THE ARGUMENT

In *Biggs v. Wilson,* the Ninth Circuit Court of Appeals erred in construing the FLSA to contain an implied "prompt payment" requirement. Such a requirement renders that Act unconstitutional in that it unnecessarily intrudes upon the sovereignty of the people of the State of California. Control of its own budget and law-making process by a State is one of the greatest attributes of state sovereignty. Thus, the court below improperly rejected a Tenth Amendment challenge to its "prompt payment" requirement because, in its eyes, the FLSA did not require that California pass its budget on time, the California constitution did.

Additionally, the court below ignored the intent of the Framers and Ratifiers of the Constitution to have the States act as a check on federal tyranny. The Ninth Circuit's opinion renders that check meaningless.

Further, the Ninth Circuit failed to distinguish *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), which, because of the nature of the present case, is easily distinguished.

Finally the court below improperly distinguished *Gregory v. Ashcroft* and *New York v. United States*. It ignored the "plain statement" rule which requires that the judiciary not construe an ambiguous statute so as to intrude on state functions that go to the heart of representative government. A State's budgetary process, as well as its law-making powers, epitomize a state function that goes to the heart of representative government.

To allow the Ninth Circuit opinion to stand would be to ignore the intent of the Framers of the Constitution and the nature and spirit of our system of dual sovereignty.

REASONS FOR GRANTING THE WRIT

I

THE NINTH CIRCUIT'S CONSTRUCTION OF THE FLSA RENDERS THAT ACT UNCONSTITUTIONAL IN THAT IT UNNECESSARILY INTRUDES UPON THE SOVEREIGNTY OF THE PEOPLE OF THE STATE OF CALIFORNIA

Control of its own budget and lawmaking process by a State is one of the greatest attributes of state sovereignty. *Duncan v. McCall*, 139 U.S. 449 (1891). *See also Sugarman v. Dougall*, 413 U.S. 634 (1973); Gregory v. Ashcroft, 115 L. Ed. 2d; and *New York v. United States*, 505 U.S. ___, 120 L. Ed. 2d 120 (1992). The ability to raise and spend revenue in a manner and amount seen fit by the citizens of a State is the lifeblood of sovereign existence. In the State of California, this issue is of particular importance with a citizenry that has become particularly active through the form of the initiative and referendum in creating "the structure of its government," *Ashcroft*, 115 L. Ed. 2d at 423. Choosing to "serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country" *(New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting)), various state constitutional amendments have been enacted in an effort to curtail the proclivity of government to expand itself. *E.g.*, Const. Art. IV, § 12; Art. XIIIA (Proposition 13 property tax roll-back and limitation); Art. XIIIB (government spending limitation); Art. IV, § 1.5, *et seq.* (Proposition 140 state term limits and legislative spending cap). *See also* Govt. Code § 526a (citizen suit to prevent

government funds).[1] This is a great benefit of our federal system where "[d]ifferent laws, customs, and opinions exist in the different states, which by a uniform system of laws would be unreasonably invaded." Letter from the Federal Farmer (October 8, 1787), *reprinted in The Antifederalist Papers and Constitutional Convention Debates* 257, 264 (Ralph Ketcham, ed. 1986).

The FLSA, 29 U.S.C. § 201, *et seq.*, deals almost exclusively with minimum wages and overtime compensation. *See* 29 U.S.C. § 201, *et seq.;* S. Rep. No. 1487, 89th Cong. 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 3002-04. Its legislative history and the precedent construing the Act have all dealt with it in terms of the effect minimum wage and overtime compensation requirements would have on the States' ability to function as independent and indestructible entities. *See, e.g.* H.R. Rep. No. 913, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 2811-53 (1975); *National League of Cities*, 426 U.S. at 837-55; and *Garcia*, 469 U.S. at 554-55. The effect was deemed minimal and the Act a constitutional exercise of congressional commerce power. *See Garcia*, 469 U.S. at 554-55; S. Rep. No. 159, 99th Cong., 1st Sess. (1985), *reprinted in* 1985 U.S.C.C.A.N. 664 (1986).

Under the "prompt payment" requirement, however, the state legislators are rendered unaccountable to their citizens and to their state constitution. They must now enact a budget, no matter how poorly drafted, wasteful,

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[1] In *National League of Cities v. Usery*, 426 U.S. 833, 846-47 (1976), *overruled by Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), this Court noted the impact that congressional action could have on California's financial well-being under the circumstances of that case. By comparison, the Ninth Circuit's opinion in *Biggs* will have an even greater negative impact.

inappropriate, or outrageous in the eyes of the polity, because the Ninth Circuit believes that Congress would require that state employees be paid promptly on pay day no matter what the consequences. *See Biggs*, 1 F.3d at 1544 (Trott, J., dissenting). Under the Ninth Circuit's construction of the FLSA, its impact will no longer be minimal or constitutional. By holding that its "prompt payment" requirement did not contravene the Tenth Amendment, the Ninth Circuit stated that any interference with California's budget process was created by state law, not federal law. *Biggs*, 1 F.3d at 1543. This is the functional equivalent of finding a gunshot victim guilty because he got in the way of the bullet.

In what can only be described as part of "the tyranny of small decisions" (Laurence H. Tribe, *American Constitutional Law* 381 (2d ed., 1988)), the court below has given "the state-displacing weight of federal law to mere congressional *ambiguity*" *(see id.* at 480). The Ninth Circuit erred in its construction of the statute, its state sovereignty analysis, and in its application of this Court's recent precedent regarding federal intrusion into the realm of state governmental functions. *See Ashcroft,* 115 L. Ed. 2d 410; *New York v. United States*, 120 L. Ed. 2d 120; and *Garcia*, 469 U.S. 528. What the Ninth Circuit did, in effect, was exercise *legislative* power in finding the "prompt payment" requirement, since such a requirement was not "unmistakably clear in the language of the statute." *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 242 (1985). *See also Ashcroft,* 115 L. Ed. 2d at 424.

II

THE NINTH CIRCUIT IGNORED THAT THE FRAMERS OF THE CONSTITUTION INTENDED A BALANCE OF POWER BETWEEN THE STATES AND FEDERAL GOVERNMENT THAT WOULD PRESERVE THE REPUBLICAN CHARACTER OF THE UNION

The Framers of the United States Constitution at Philadelphia were primarily concerned with the inability of the Confederation to conduct the business of the nation, hamstrung as it was, by the overriding reservation of powers to the States and the "Whiggish" democratic ideals still fresh from the Revolutionary War. As Alexander Hamilton stated, "[t]he interfering and unneighborly regulations of some States ... if not restrained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy." *The Federalist No. 22*, at 144-45 (Alexander Hamilton) (Clinton Rossiter, ed. 1961). The Framers believed that their proposed government could sufficiently provide the stability and unity necessary for a strong economy and international presence, while at the same time ensure individual liberty.

The delegates to the various state ratifying conventions, however, greatly feared consolidation of power in the District of Columbia. "After we have given them all our money, established them in a federal town, given them the power . . . to establish their arbitrary government, what resources do the people have left?" II *The Debates of the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787* at 62 (Jonathan Elliot, ed., 2d ed. 1836) (hereinafter *Elliot's Debates*). "Liberty! What is Liberty? The power of governing yourselves. If you adopt this Constitution, have

you this power? No: you give it into the hands of a set of men who live one thousand miles distant from you." IV *Elliot's Debates* 313.

To calm these fears, and assure ratification, the Federalists claimed that the structure of the Constitution would protect state sovereignty and personal liberty.

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite .... The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern . . . *the internal order*, improvement, and prosperity of the State.

The Federalist No. 45 at 292-93 (James Madison) (Clinton Rossiter, ed. 1961) (quoted in *Ashcroft*, 115 L. Ed 2d at 422 (first alteration in *Ashcroft*, emphasis added)). As James Wilson stated at the Pennsylvania ratifying convention:

> Whatever object of government is confined, in its operation and effects, within the bounds of a particular state, should be considered as belonging to the government of that state; whatever object of government extends, in its operation or effects, beyond the bounds of a particular state, should be considered as belonging to the government of the United States.

II *Elliot's Debates* 424. Under the unamended Constitution the States would "alienate" their sovereignty to the new National government in only three cases:

> where the Constitution in express terms granted an *exclusive* authority to the Union; where it granted in one instance an authority to the Union, and in

> another *prohibited* the States from exercising the like authority; and where it granted an authority to the Union to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*.

The Federalist No. 32 at 197, 198 (Alexander Hamilton) (Clinton Rossiter, ed. 1961) (first and second emphasis added) (discussing U.S. Const. Art. 1, § 8, cl. 17; *id.* cl. 1; *id.* § 10, cl. 2; *id.* § 8, cl. 4).

This delineation of the spheres of sovereignty was expressed *before* the adoption of the Tenth Amendment, or any other of the first ten amendments to the Constitution. In fact, Alexander Hamilton predicted that the adoption of a Bill of Rights would give the National government the "colorable pretext" to run roughshod over the jurisdictional restraints imposed on it by the text of the Constitution by legislating right up to the edge of the first eight amendments. *The Federalist No. 84* at 513 (Alexander Hamilton) (Clinton Rossiter, ed. 1961). *See also* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987). Congress, however, has been permitted to ignore the Tenth Amendment and encroach on state sovereignty with impunity since 1937. Even in *Gibbons v. Ogden*, 22 U.S. 1, 196 (1824), which is often cited for the very broad power Congress has under the Commerce Clause, it was noted that the congressional power to regulate interstate commerce was "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations *other than those prescribed in the Constitution*." *Gibbons v. Ogden*, 22 U.S. 1 (quoted in, *e.g.*, *United States v. Darby*, 312 U.S. 100, 114 (1941) (emphasis added). In the present case, this Court must enforce the "limitations prescribed" by the Tenth Amendment, the "few and defined" nature of congressional powers, and the guarantee to the States of a republican form of government, U.S. Const. Art. IV, § 4.

The decision of the Ninth Circuit is horribly inconsistent with the intent of the Ratifiers, who considered the limitation of federal encroachment into the realm of the States as the primary assurance of republican accountability and personal liberty. Prevalent in every slate of amendments proposed by the various ratifying conventions was a call to protect the sovereignty of the States for this purpose. *See* John G. Schmidt, Jr., *The Tenth Amendment: A "New" Limitation on Congressional Commerce Power*, 45 RUTGERS L. REV. 417, 426-27 & n.56 (1993).

This Court must therefore correct the error of the Ninth Circuit in *Biggs* and continue on the path taken in such cases as *Sugarman v. Dougall*, 413 U.S. 634; *Gregory v. Ashcroft*, 115 L. Ed. 2d 410; and *New York v. United States*, 120 L. Ed. 2d 120, to preserve some semblance of balance between the States and National government, especially when the issue involves the inherently sovereign act of a State's budget process and lawmaking powers, as well as the control of that State's citizens over its taxing and spending habits. *Duncan v. McCall*, 139 U.S. at 461. *See also Maryland v. Environmental Protection Agency*, 530 F.2d 215, 225 (4th Cir. 1975) ("if there is any attribute of sovereignty left to the states it is the right of their legislatures to pass, or not to pass, laws"), *vacated and remanded for consideration of mootness sub nom. Environmental Protection Agency v. Brown*, 431 U.S. 99 (1977) (*per curiam*). To do otherwise would eviscerate the States' ability to act not only as a check on the National government, but as a laboratory for reform geared to the effective administration of government.

III

WHAT REMAINS OF THIS COURT'S OPINION IN GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY WAS IMPROPERLY APPLIED TO THE PRESENT CASE BY THE NINTH CIRCUIT

In 1985, the five Justices of this Court that comprised the majority in *Garcia,* 469 U.S. 528, rejected "almost 200 years of the understanding of the constitutional status of federalism ... in support of the view that the role of the States in the federal system may depend upon the grace of elected federal officials, rather than on the Constitution as interpreted by this Court." *Id.* at 560-61 (Powell, J. dissenting). *Garcia*, however, may be distinguished from the present case, both in its law and its facts, because that case dealt solely with the applicability of specific and explicit federal legislation to persons employed in areas that were arguably "traditional governmental functions." *Id.* at 533-47, 554-57. In *Biggs*, however, the Ninth Circuit added an "implied prompt payment provision" to the FLSA thus threatening the independent existence of the States. Thus, even though the FLSA is generally applicable to both public and private employers, (unlike the legislation in *New York v. United States,* 120 L. Ed. 2d 120), the effect is the same in that the States, as a check on federal power, are rendered powerless before an unlimited federal reach.

Additionally, in *Garcia* this Court stated that the "*principal* [but not the sole] means" for ensuring state sovereignty "lies in the structure of the federal government itself," 469 U.S. at 550-51 (emphasis added), and "[a]ny substantive restraint on the exercise of Commerce Clause powers ... must be tailored to compensate for possible failings in the national political process. *Id.* at 554. Such a failing was identified in *Ashcroft* as a legislative ambiguity (115 L. Ed. 2d at 425-26), and in *New York* as an attempt to

commandeer the legislative processes of a State (120 L. Ed. 2d at 140, 144 (discussing *Hodel v. Virginia Surface Mining and Reclamation Act*, 452 U.S. 264, 288 (1981))). In *Biggs*, the Ninth Circuit did not even bother to find an ambiguity, it crafted its own legislation and, as a result, commandeered not only the legislative processes of California, but its constitutional processes and republican form of government as well. The State of California must now enact a budget, no matter how poorly drafted, wasteful, inappropriate, or outrageous in the eyes of the polity because the Ninth Circuit believed Congress commanded that state employees be paid promptly on pay day no matter what the consequences.

This Court in *Garcia* cautioned that there were several constitutional "postulates which limit and control" congressional power that the federal courts "must look for" so as to "be faithful to the underlying federal premises of the Constitution." 469 U.S. at 547. The *Garcia* majority, while noting the problems of judicial review, conceded that the National government cannot devour the essentials of state sovereignty. *Id.* The Ninth Circuit failed to realize this. The *Garcia* Court also quoted with approval the fact that the Constitution "recognizes and preserves the autonomy and independence of the States--independence in their legislative and independence in their judicial departments." *Id.* at 549 (quoting *Erie R. Co. v. Tompkins,* 304 U.S. 64, 78-79 (1938)). The Ninth Circuit's ruling ignores this recognition.

Furthermore, an additional "postulate" was identified in *New York* and *Ashcroft:* that federal actions which threaten the guarantee of a republican form of government must be reviewed by the judiciary. *See Ashcroft,* 115 L. Ed. 2d at 425-26; *New York,* 120 L. Ed. 2d at 155-57. That this protection should apply to a state's lawmaking powers, in the face of the congressional commerce power, is obvious. *See, e.g., Duncan v. McCall*, 139 U.S. 449 (1891). This is especially so when congressional power under Section 5 of

the Fourteenth Amendment is not at issue. *See Ashcroft*, 115 L. Ed. 2d at 420-32, 425 n.*.

Even if this Court finds that Congress did intend a "prompt payment" requirement against the States, this Court should revisit the holding of *Garcia* in light of its more recent decisions in *Ashcroft* and *New York*. The Commerce Clause grants an enumerated, defined power over "commerce *among* the several states." The fact that state employees were paid two weeks late pursuant to state constitutional and statutory provisions cannot be considered within this grant of congressional jurisdiction. Further, the Tenth Amendment emphasizes the structural limits that the Commerce Clause imposes on congressional intrusion into state functions that go to the heart of representative government and gives substance to the guarantee to every State of a republican form of government.

Thus, it is imperative that this Court grant review in this case to correct the Ninth Circuit's overbroad interpretation of the holding of *Garcia* and the improper construction of the FLSA. Review is necessary because the ruling of the Ninth Circuit subverts the constitutional mandate of "an indestructible Union, composed of indestructible States." *Texas v. White*, 74 U.S. 700, 725 (1871).

IV

THE NINTH CIRCUIT ERRED BY NOT APPLYING THE "PLAIN STATEMENT RULE" TO THE FLSA IN THE SAME MANNER THIS COURT HAS APPLIED IT TO THE ADEA

In 1991, this Court construed the federal Age Discrimination in Employment Act, 29 U.S.C. § 621-34 (ADEA), so as to not conflict with a Missouri state constitutional provision mandating the retirement of state court judges at seventy years of age. *Ashcroft,* 115 L. Ed. 2d 410. The Court framed its approach by noting that Congress had, in fact, extended the ADEA to the States. *Id.* at 426 (citing *EEOC v. Wyoming*, 460 U.S. 226 (1983) (ADEA extension to States valid under Commerce Clause). The *Ashcroft* Court stated, however, that it must be *absolutely certain* that Congress intended the specific intrusion at issue. *Id.* The Court went on to hold that, because of the specific ambiguity in the ADEA as to whether appointed state court judges were to be included within the scope of the ADEA, it "would not attribute to Congress an intent to intrude on state governmental functions ...." *Id.* at 430. In the present case, the Ninth Circuit misinterpreted *Ashcroft*, the applicability of the plain statement rule, and the breadth of the FLSA.

The *Ashcroft* case dealt with the maximum age of state court judges. The present case deals with the State of California's authority over its own budget process and law-making ability. This latter issue should also be treated by the federal courts as an issue that "goes beyond an area traditionally regulated by the States." *Id.* The present case is even more compelling than *Ashcroft*, since the *Ashcroft* Court conducted its analysis of the ADEA under both the Commerce Clause and Section 5 of the Fourteenth Amendment. *See id.* at 420-32. Unlike the Commerce Clause, the Fourteenth Amendment was intended to intrude

into the sovereign functions of a State (*see id.* at 425, n.*), and should give a court pause before striking down legislation that intrudes into certain sovereign functions of a State. The FLSA, however, was *not* enacted pursuant to the Fourteenth Amendment. It was enacted solely under Congress' commerce power. This being the case, the concerns of a State's citizens over their State's budget, "a decision of the most fundamental sort for a sovereign entity," should be accorded much more deference than that given by the Ninth Circuit. The FLSA does not contain a "plain statement" of congressional intent to impose a "prompt payment" requirement on the States. In fact, the statute is ambiguous, if not indifferent to the issue. The ambiguity in the FLSA regarding the prompt payment of state employee wages must therefore be construed in favor of the State of California and its citizens.

CONCLUSION

The Ninth Circuit's "implied prompt payment requirement" in the FLSA is a misconstruction of the intent and language of the FLSA and contradicts this Court's plain statement rule. Even if it were the intent of Congress to require such "prompt payment," this would upset the usual constitutional balance of federal and state powers as well as

violate the Tenth Amendment, the Guarantee Clause, and the Commerce Clause itself. The Court should therefore grant review to determine these important constitutional and statutory issues and correct the errors of the court below.

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Respectfully submitted,

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